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IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

No. 2665.

Wm. H. Moore, Jr., Trustee in Bankruptcy of the estate of Berlin Dye Works & Laundry Company, a corporation, bankrupt,

Appellant,

vs.

C. K. Douglas,

Appellee.

BRIEF OF APPELLANT IN ERROR.

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STATEMENT OF FACTS.

Judgment was rendered in favor of said appellee, C. K. Douglas, and against said bankrupt corporation, on July 11, 1913, in the Superior Court of the state of California, in and for the county of Los Angeles, for the sum of $10,000.00 and costs, in an action theretofore commenced by said appellee against said bankrupt corporation to recover damages for personal injuries suffered by reason of the alleged negligence of

said Berlin Dye Works & Laundry Company. After the entry of said judgment, and on September 10th, 1913, the Berlin Dye Works & Laundry Company appealed from said judgment to the Supreme Court of the state of California, executing a cost bond in the sum of $300.00, but did not execute a supersedeas bond. [Tr. 12.]

On September 15, 1913, an involuntary petition in bankruptcy was filed against said Berlin Dye Works & Laundry Company, a corporation, and on the 7th day of October, 1913, it was duly adjudicated bankrupt. February 14, 1914, said C. K. Douglas filed a claim against the estate of the above named bankrupt corporation, based upon an abstract of said judgment entered July 11, 1913. April 21st, 1914, the claim of said C. K. Douglas was presented to the bankruptcy court for allowance and oral objections were made thereto at said time by the trustee of the estate of said bankrupt, upon the ground that said C. K. Douglas had no provable claim against the estate of said bankrupt; and on July 23rd, 1914, formal written objections were filed on behalf of said trustee against said claim, on the grounds:

1st. That said claimant was not entitled to prove a claim against the above named bankrupt estate;

2nd. That the judgment upon which said claim was based was not a final judgment, and

3rd. That claimant's proof of debt should be only for the sum of $10,097.10. [Tr. 7, 8, 13.]

December 17th, 1914, the judgment of the Superior Court in said case upon appeal was affirmed by the Supreme Court of the state of California, and said

judgment became final January 16, 1915. [Tr. 14.] Thereafter said claim of C. K. Douglas was, by order of the referee, disallowed and expunged from the files. From such order a review was taken to the District Court of the United States for the Southern District of California, which court reversed the order of the referee theretofore made and entered and allowed the claim of said C. K. Douglas. [Tr. 42, 43 and 44.] From such order and decree of said District Court this appeal was taken.

POINTS AND AUTHORITIES.

Is a judgment of a Superior Court of the state of California, founded in tort, from which an appeal is pending to the Supreme Court of the state at date of filing of petition in bankruptcy, where no supersedeas bond on appeal was filed, a provable claim in bankruptcy? Counsel for appellant contends that it is not.

To be provable such a judgment must come squarely within the definition of section 63 of the Bankruptcy Act, which reads, so far as it is applicable to this case, as follows:

> "Debts Which May Be Proved.—(a) Debts of the bankrupt which may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not."

If such a judgment is a fixed liability, absolutely owing at the date of the filing of the petition, it is a provable and allowable claim, otherwise not.

"The status of claims at the time of the filing of the petition in bankruptcy, and not at any subsequent time, fixes the right of the owners to share in the distribution of the estate of the bankrupt."

Board of Com'rs v. Hurley (C. C. A. 8th Cir.), 169 Fed. 92, 22 A. B. R. 209.

"If at that time it does not fall within that definition (i. e., of Sec. 63), but does so at some later time, it cannot be proved."

Lowell, C. J., in *In re* Pettingell & Co., 137 Fed. 143, 145, 14 A. B. R. 728, 731.

Section 63b of the act adds nothing to the class of debts which may be proved under paragraph (a), its purpose being to permit an unliquidated claim coming under the provisions of sub-section (a) to be liquidated as the courts shall direct.

Dunbar v. Dunbar, 190 U. S. 340, 350, 10 A. B. R. 139.

Was the judgment in the instant case a fixed liability, absolutely owing at the date of the filing of the petition?

The Standard Dictionary defines "absolutely" as follows:

"In an absolute degree or manner; without limitation; completely."

It defines "absolute" as meaning "free from liability to change, fixed, irrevocable."

If the judgment in question at date of bankruptcy comes within such definition it was a claim provable in bankruptcy, otherwise not.

There is no question but that an unliquidated claim for damages for personal injury not reduced to judgment prior to the filing of the petition, is not provable or allowable in bankruptcy and no citation of authorities on that point is necessary.

One learned bankruptcy author has written a very forceful argument to the effect that a final judgment rendered before bankruptcy is not a provable debt within the meaning of the acts.

See article by the late Mr. Loveland in Case and Comment of February, 1914.

The question here turns upon the force and effect of the judgment in question, and it is the duty of the federal courts in this state to give to judgments of the state courts the same force and effect they have under the state laws.

Sec. 905, U. S. Rev. St.;

Contra Costa Water Co. v. City of Oakland, 165 Fed. 518, 529;

Union etc. Bank v. Memphis, 111 Fed. 561;

Jeter v. Hewitt, 22 How. (U. S.) 352, 364.

Section 577 of the Code of Civil Procedure of the state of California defines a judgment as follows:

> "A judgment is the final determination of the right of the parties in an action or proceeding."

Section 1049 of the same code provides:

> "An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied."

In view of the foregoing it is apparent at a glance that the so-called judgment attached to the claim of C. K. Douglas and which is in question here, was in fact no judgment at all in the sense of being a finality, and at the date of bankruptcy was neither a fixed liability, nor was it absolutely owing. It was not "free from liability to change, fixed, irrevocable" nor was it "unquestionable" and the fact that later it became all of those things does not change its status as it existed at the date of the filing of the petition.

Board of Com'rs v. Hurley, *supra;*
In re Pettingell & Co., *supra.*

We submit that the fact that in California an appeal from a money judgment does not, in itself, stay the execution of the judgment unless a supersedeas bond is filed, should have no consideration in determining this question. That fact does not make the judgment "absolutely owing" nor a "fixed liability," and it is the power and duty of the appellate court under section 957 of the Code of Civil Procedure of the state of California, when any judgment or order is reversed or modified to make complete restitution of all property and rights lost, so far as such restitution is consistent with the protection of the purchaser of property at a sale ordered by the judgment, or had under process issued upon the judgment. Such section also provides for relief in such cases by an action against the respondent enforcing the judgment for the proceeds of the sale of the property, after deducting therefrom the expenses of the sale.

The real test as to the force and effect of such a

judgment as constituting the basis for a claim in bankruptcy at date of filing the petition is, would such a judgment be evidence and conclusive as to the amount due under it? Counsel for trustee contends that regardless of how the law on that point may be in other states, the judgment here in question at date of filing of the petition was not evidence of that fact.

Care must be taken in deciding this case to distinguish between cases arising under state laws where by force of statute a judgment becomes final for all purposes at date of entry, as in Michigan, and cases like *In re* Putnam, 193 Fed. 464, where the judgment in question was final, the time for appeal having elapsed.

In the case of Hills v. Sherwood *et al.*, 33 Cal. 474, the Supreme Court of the state of California held that a right of action for the breach of the covenant in question accrued when time for appeal from judgment expired, and not at date of rendition of same in the lower court, and the court there clearly distinguishes between the force and effect of such a judgment at both dates, in the following language, quoted from page 478 of the opinion:

> "Although a judgment may be final with reference to the court which pronounced it, and, as such, be the subject of an appeal, yet it is not necessarily final with reference to the property, or rights affected, so long as it is subject to appeal and liable to be reversed. The 'final adjudication' intended by the parties to the covenant in question was, doubtless, an adjudication final as to the land and the rights of the parties. Had an appeal been taken before this action was brought,

unquestionably, the action could not have been maintained until after a final disposition of the appeal."

"While proceedings are pending for the review of a judgment, either on appeal or motion for a new trial, the litigation on the merits of the case between the parties is not ended; and until litigation on the merits is ended, there is no finality to the judgment, in the sense of a final determination of the rights of the parties, although it may have become final for the purpose of an appeal from it."

Gillmore v. American C. I. Co., 65 Cal. 63, 66.

In the case of Harris v. Barnhart, 97 Cal. 546, the judgment was offered in evidence after time for appeal had expired, although at the time answer was filed setting it up as defense the time had not yet expired; the court there held that it was competent evidence at the time offered, there being no objection on the ground that it had been prematurely pleaded, and such objection being waived. The court in such case, on page 550, uses the following language:

"It has been repeatedly held by this court that the operation of a final judgment is suspended by an appeal therefrom, and that pending such appeal the judgment is not admissible in another case as evidence, even between the same parties."

"But it is claimed that the court below erred in admitting in evidence against plaintiff's objection the judgment in the former action, because it had not become final with reference to the subject-matter thereof, as the time for appeal therein had not expired when the trial of this cause was had. We think this claim should be sustained.

"Section 1049 of the Code of Civil Procedure provides that an action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied.

"It appears that the judgment in the former action was given and entered July 29, 1890, and that said action was still pending within the meaning of the provisions of the foregoing section when this cause was tried in the court below, which the record shows was commenced on March 12, 1891, more than four months before the time for appeal had passed.

"It therefore follows that the court erred in admitting in evidence the judgment roll in the former action against plaintiff in bar of plaintiff's right to recover in this action."

Naftzeger v. Gregg, 99 Cal. 83, 88.

"To prove that fact findings, conclusions of law and decree in the case of Blythe v. Ayers were introduced in evidence. We think them wholly insufficient to prove it. The findings and decree in that action were filed and entered October 22, 1890. The application for an allowance was filed and heard October 31, 1890. The judgment was but nine days old when offered in evidence, and under the statute the losing parties were entitled to an appeal from it at any time within sixty days from its rendition. By virtue of section 1049 of the Code of Civil Procedure, an action is pending until the time for appeal has expired, or the judgment sooner satisfied. This judgment, being but nine days old at the date of the hearing, and not satisfied, afforded no evidence of the facts therein

found, for it was not a final judgment inasmuch as the action was still pending. A judgment, in order to be admissible in evidence for the purpose of proving facts therein recited, must be a final judgment in the cause, and if the action in which the judgment is rendered is still pending, necessarily the judgment is not final. As was said in Hills v. Sherwood, 33 Cal. 478: 'Although a judgment may be final with reference to the court which pronounced it, and as such be the subject of appeal, yet it is not necessarily final with reference to the property or rights affected so long as it is subject to appeal and liable to be reversed.' "

In re Blythe, 99 Cal. 472, 475.

In the above case the Supreme Court quotes with approval the following language from the case of Webb v. Buckelew, 82 N. Y. 560:

" 'It is, therefore, only a final judgment upon the merits which prevents further contest upon the same issue, and becomes evidence in another action, between the same parties, or their privies. Until final judgment is reached, the proceedings are subject to change and modification, are imperfect and inchoate, and can avail nothing as a bar or as evidence, until the judgment with its verity as a record settles finally and conclusively the question at issue.' "

And again:

" 'Whenever it fails to fix and determine the ultimate rights of the parties, wherever it leaves room for a final decision yet to be made, it is not admissible in another action, for the plain reason that it has finally decided and settled nothing. Until the judgment comes, no man can know what the ultimate decision will be.' "

"The court erred in holding that the judgment rendered in the other action was a bar to the plaintiff's right of recovery for the moneys paid by her under the agreement. At the time that the court made its decision in the present case, the other action was still pending (sec. 1049, Code Civ. Proc.), and while that action was so pending the judgment rendered therein could not be a bar to the prosecution of the present action."

In re Story v. Story & Isham C. Co., 100 Cal. 41, 42.

"That judgment was not a bar to the matters alleged in the defendant's answer as a defense, nor to the same matters set out in the cross-complaint, and upon which he demanded the relief given him by the court below. It had not become final when the cross-complaint was filed, nor yet when the action was tried, and the doctrine of *res adjudicata* only applies to final judgments. The time to appeal from the judgment of November 24, 1888, had not expired when the cross-complaint was filed, and, although no appeal had been taken therefrom, the action was still pending within the legal meaning of that term (Code Civ. Proc., sec. 1049), and the judgment was not a bar to a retrial of the matters alleged in the cross-complaint."

Brown v. Campbell, 100 Cal. 646.

The Supreme Court in the case of Feeney v. Hinckley, 134 Cal. 467, where the question was whether the five-year statute of limitations in a case of action on a judgment commenced to run at date of entry of judgment or at expiration of time for appeal, reviewed the foregoing cases and on the doctrine of those cases reversed the lower court, which held that the statute

began to run at date of entry of judgment. It appears that no appeal from the judgment in question had actually been taken, but that the time for appeal had not as yet expired at the time action was commenced, which date was subsequent to date of entry of judgment. On page 469 of the opinion the court uses the following language:

> "While, as pointed out by Mr. Justice Harrison in his concurring opinion in Naftzger v. Gregg, 99 Cal. 83, and in Cook v. Rice, 91 Cal. 664, cases may arise in which, for certain purposes, a judgment may be evidentiary before it has become final, these cases are exceptional, and the general rule prevailing in this state is that which has been so frequently declared."

In the case of Cook v. Rice, referred to in the above citation, the introduction of the judgment roll as evidence was objected to on the ground that the time for appeal had not expired, and the court held that it was not necessary that such judgment should be final in the sense that it was not liable to be reversed on appeal; that it was enough that it was in court, not suspended by appeal or otherwise. We submit that notwithstanding that the case is not an authority in the instant case, where the appeal was actually taken, that it is out of harmony with the decisions of the state, both prior and subsequent to it

Judge Harrison, in his concurring opinion in the case of Naftzger v. Gregg, *supra,* said that the objection to the introduction of the judgment went to its weight as evidence and not its competency; that it might be shown that there had already been a final determination on

appeal, or the parties might have consented that there should be no appeal, but that in the absence of other evidence than the judgment itself it constituted no bar.

In view of the facts in the case of Feeney v. Hinckley the remarks of the Supreme Court to the effect that cases might arise where, for certain purposes a judgment may be evidentiary, were pure *dicta,* but in any event, in view of the opinions which gave rise to them, by no stretch of the imagination could the judgment in the instant case at date of bankruptcy be held to be one of the exceptions to the general rule of the state recognized and affirmed in Feeney v. Hinckley.

> "The general rule undoubtedly is that until a judgment becomes final by affirmance on appeal, or by the lapse of the time within which an appeal might be taken, such judgment is not admissible in evidence and cannot be relied upon as the foundation of rights declared in it."
>
> Sewell v. Price, 164 Cal. 265, 270.

The above action was a creditor's bill based on a judgment which was objected to as not being final. The court, in considering the matter, used the language above quoted, but held that the rule had no application to the case at bar, as all that was required of the creditor in such case was to put himself in a position to levy execution. The fact that the time for appeal had not expired not preventing the issuance or levy of execution under a money judgment, it was accordingly held that in the absence of an undertaking preventing the execution from issuing a plaintiff who had recov-

ered a judgment might maintain a creditor's bill, notwithstanding the fact that the time for an appeal had not expired, or an appeal had actually been taken and was pending.

Two of the California federal courts have had occasion to consider the question of the force and effect of a judgment from which an appeal was taken, namely, Contra Costa Water Co. v. City of Oakland, *supra,* and *in re* Yates, 114 Fed. 365, 8 A. B. R. 70. In the first case on page 529 of the opinion, Judge Gilbert uses the following language:

> "No suggestion is offered to impeach the conclusiveness of that adjudication except the fact that defendants have appealed from it. In some states, and perhaps by the weight of judicial decisions generally, it is held that, where the power of an appellate court is confined to the affirmation, reversal or modification of a judgment, order or decree which is appealed from, the appeal and *supersedeas* merely operate to stay execution and other final process upon the judgment, and that either party may invoke it as an estoppel. In other states, however, it is held that perfection of an appeal suspends the judgment for all purposes and deprives it of its effect as an estoppel. It is so held by the decisions of the Supreme Court of California."

In the above case Judge Gilbert denied the judgment the effect of an estoppel, but considered it on application for a restraining order as "of persuasive force as evidence" in enabling the court to exercise its judicial discretion in allowing or withholding the order asked for. A far different situation from its use on the

merits as a full, complete adjudication of the rights of the parties which the judgment in the present case is attempted to be used for.

In the case of *in re* Yates, *supra,* a motion was made to vacate the decree of the court adjudicating Yates bankrupt upon his voluntary petition, and for the dismissal of the petition. The only debt mentioned in the schedule filed with the petition being described as a judgment in favor of Risdon, the moving party, for the sum of $894.00, which judgment was obtained in an action for a wilful, malicious injury to the person of Risdon. After the rendition of the judgment and before the adjudication in bankruptcy an appeal was taken which was pending at the time of the hearing of the motion, the court considering the force and effect of the judgment under the codes of California and state decisions, granted the motion "because, at the date of the filing of his voluntary petition, there was no existing, provable claim against his estate, under the Bankruptcy Act."

The court below in its opinion in the instant case [Tr. 38 *et seq.*] criticises the doctrine laid down in Feeney v. Hinckley *(supra),* and the cases cited in it, and in support of the statement made in the opinion [Tr. 39] that the great weight of authority is to the contrary, cites the following cases, viz.: Taylor v. Shew, 39 Cal. 536; Dowdell v. Carpy, 137 Cal. 338; Rogers v. Superior Court, 126 Cal. 183; Cook v. Rice, 91 Cal. 668, and Dore v. Southern Pacific Co., 163 Cal. 195.

The case of Dore v. Southern Pacific Co. is one in which, with other evidence as to the title to land, certain judgments under the McEnerney Act of 1906 were introduced determining that the plaintiffs were the owners of the properties. Regarding the judgments, the court says on pages 194 and 195:

> "The said judgments would have become final, by expiration of time for appeal, before the findings were signed, and, as no showing was made to the contrary, we must presume that there was no appeal and that they were competent evidences of title during the continuance of the trial, which, in legal contemplation, continued until the decision of the court below was made. There was no attempt whatever, by the defendant, on the trial, to show affirmatively any defect in plaintiffs' title. From all these facts and circumstances the court could reasonably infer that the plaintiffs were the owners of the land at the time the contract was made and thereafter until the time of trial. We think the evidence was sufficient to sustain the finding as to title. The ruling admitting in evidence the aforesaid judgments before they became final seems to be in accord with Cook v. Rice, 91 Cal. 668, and contrary to Naftzger v. Gregg, 99 Cal. 88 (37 Am. St. Rep. 23, 33 Pac. 757). The error, if any, was harmless, since they became final before the trial was closed."

The court there called attention to the fact that Cook v. Rice is not in harmony with the later case of Naftzger v. Gregg, *supra,* but refused to assign error because of the admission of the judgments as there was no prejudice by reason thereof. This case also is cited in the opinion of the learned judge in the court below

in the instant case as authority for postponing action on a claim based on such a judgment until final disposition is made of the case by the Supreme Court. He evidently did not observe the distinction between the pendency of the bankruptcy as a proceeding and the date of the filing of the petition as date on which a claim must be provable in bankruptcy if it is to participate in the assets of the estate. That is the date when the bankrupt's property comes into the custody of the court for the benefit of those only who hold provable and allowable claims at that time, and from whose debts he is discharged, and the creditors' rights are determined by the status of his claim at that time.

> "On that date the property of the bankrupt passes from his control to the court or to its receiver, and thence to the trustee in trust for the creditors of the bankrupt in proportion to the amounts of their claims at that time. On that date there vests in each creditor as a *cestui que* trust an equitable estate in such a part of the property of the bankrupt as the amount of his provable claim at that time bears to the entire amount of the provable claims against the estate. On that date the bankruptcy law deprives the creditor of all his common-law remedies to collect his debt out of the property of his debtor and to collect subsequent interest on his claims against that property, and gives him in lieu thereof this equitable estate in the property of the bankrupt. Thus the filing of a petition upon which a subsequent adjudication of bankruptcy is rendered places all the property of the bankrupt 'which prior to the filing of the petition he could by any means have transferred

or which might have been levied upon and sold under judicial process against him' in *custodia legis.* Section 70a (5), 30 Stat. 566 (U. S. Comp. St. 1901, p. 3451). From that hour the bankrupt is divested of the power to appropriate it to the payment of his debts or to use and dispose of it at will, and that authority is vested in the District Court. Every suit against him upon a provable claim is stayed from the date of the filing of the petition. Section 11a, 30 Stat. 549 (U. S. Comp. St. 1901, p. 3426). Every person is forbidden to receive from the bankrupt any material amount of property after that date with intent to defeat the act. Section 29b, 30 Stat. 554 (U. S. Comp. St. 1901, p. 3433). Every intentional preference after that date is voidable. Section 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445). Upon the filing of the petition the court may take immediate possession of the property if the bankrupt is neglecting it so that it is deteriorating in value. Section 69a, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3450). And upon the appointment of the trustee all the property of the bankrupt which, prior to the filing of the petition, he could have transferred, or which could have been seized or sold under judicial process against him, passes to this officer of the court. Section 70a (5). Indeed, the condition at the time of the filing of the petition measures the extent of the estate and the rights of all creditors of the bankrupt and all parties interested in the property throughout all the provisions of the law. Sections 1 (10), 3b, 9b, 29b (4), 63a (1), 30 Stat. 544, 546, 549, 554, 562 (U. S. Comp. St. 1901, pp. 3419, 3422, 3426, 2447)."

Board of Com'rs v. Hurley, *supra.*

The case of Taylor v. Shew is in conflict with the later California cases and absolutely opposed to the provisions of the Practice Act of that time, now embodied in sections 577 and 1049 of the Code of Civil Procedure, upon which such later cases base their decisions, and we submit should not be considered by the federal courts as an authority in determining this question. The learned judge below admits in his opinion that the case is in conflict with that of Feeney v. Hinckley and cases cited therein.

Cook v. Rice is distinguished by the court itself from the instant case. On page 668 of the opinion the court says (italics ours):

> "It was enough that the judgment was in force, *not suspended by an appeal* or otherwise, and that while in force, it finally disposed of the controversy."

As stated before, this case is also in conflict with the later cases which must be taken as the law of the state.

Rogers v. Superior Court of Riverside County was an application for a writ of mandate commanding the Superior Court of this county to entertain a motion of petitioner to vacate and set aside an injunction granted by decree in a case then on appeal. Such a motion was held to be a "proceeding in the court below upon the judgment" appealed from, which was stayed by Sec. 946, Code of Civil Procedure. This case would not seem to be pertinent to the question here.

In the case of Dowdell v. Carpy it was stipulated that a judgment pleaded as a counter-claim

> "shall be treated and considered for all purposes of set-off or counter-claim * * * and all objections to said decree as a counter-claim herein for said amounts, so far only as objection has been or may be made upon the grounds that it is a decree for the foreclosure of a mortgage, and that the sale directed thereby has not been made, and a deficiency judgment entered therein, is hereby waived."

In view of such a stipulation, the language quoted from the opinion of Dowdell v. Carpy by the learned judge below [Tr. 40] would seem to have no place in the opinion, and such case could not be an authority on the question involved here. Dowdell v. Carpy is the more recent California decision referred to by the court below in its criticism of Feeney v. Hinckley.

A single decision of a state court which departs from the whole course of the decisions of that state, will not be followed.

Hardin v. Jordan, 140 U. S. 371, 380.

And if there be any inconsistency in the opinion of the state courts, the federal courts will follow the latest settled adjudication in preference to the earlier ones.

Wade v. Travis County, 174 U. S. 508.

A division of opinion between the members of the state Supreme Court, although a close one, does not prevent the opinion from becoming the decision of the court, and as such conclusive upon the federal courts.

Williams v. Eggleston, 170 U. S. 311.

And in determining what the law of the state is, mere *dicta* in an opinion of a state court is not to be considered.

Matz v. Chicago etc. R. Co., 85 Fed. 180;
Hardin v. Jordan, 140 U. S. 371;
Southern R. Co. v. Simpson, 131 Fed. 705;
Lyman v. Hilliard, 154 Fed. 331.

In view of the well-established principles of law above stated, the authorities cited by the court below in its opinion would seem not to be pertinent to the question here involved, and we contend that under the law of this state the claim of C. K. Douglas at the date of filing of the petition was not a fixed liability, absolutely owing. The judgment upon which it was based was subject to modification or reversal. No action could have been based upon it. It had no value as evidence of the facts stated therein. It was not *res adjudicata* as between the parties, nor of any validity as a bar, and was in fact not a judgment at all so far as finally determining the rights of the parties it concerned, which is the very element necessary to make it fixed and absolute in this case.

By reason of the foregoing, we respectfully submit that the order and judgment appealed from should be reversed and the order of the referee affirmed.

Dated January 22nd, 1916.

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